Supreme Court, U.S.
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No.02-489

IN THE

Supreme Court of the United States

JARROW FORMULAS, INC.,

Petitioner,

v.

NUTRITION NOW, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Nutrition Now, Inc., has no parent corporation, and no publicly-held company owns 10% or more of its stock.

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The Petition for a Writ of Certiorari should be denied because there is no compelling reason for this Court to exercise its discretion to review the judgment of the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit"), issued on June 4, 2002, affirming the Judgment of the United States District Court, Central District of California (the "District Court"), entered on November 14, 2000.

There is no conflict between the Ninth Circuit's ruling and the decisions of other United States Court of Appeals, nor does the Petition raise any important issue of law. Indeed, on the record below, neither of the questions posed by Petitioner, Jarrow Formulas, Inc. ("Jarrow"), presents any genuine issue. Rather, what Jarrow advances is solely a matter of private commercial interest. This is admitted not only by Jarrow's protracted delay in filing suit, but by its failure to even attempt to involve any of the Federal regulatory agencies charged with protecting the public interest. Both the District Court and the Ninth Circuit considered Jarrow's public interest argument and correctly rejected it because no real issue of public interest is implicated.

Regarding the applicability of laches, the case below involved one basic question: Whether (i) Jarrow's unreasonable delay and (ii) resulting prejudice to Respondent Nutrition Now, Inc. ("Nutrition Now") bars prospective injunctive relief to Jarrow in a false advertising action. The District Court, citing extensive and controlling authority, so found; the Ninth Circuit agreed. Both Courts' rulings were consistent with applicable authority in the other Circuits.

Jarrow has conjured a phantom split of authority between the Third, Fourth, and Sixth Circuits, on the one hand, and the Seventh and Ninth Circuits, on the other hand, regarding whether a laches defense may bar injunctive relief. In fact,

there is no split of authority. All of the Circuits that have considered the issue have acknowledged that a party's laches may bar injunctive relief in appropriate circumstances. The most that can be said is that some Circuits allow the laches defense sparingly and apply it more narrowly under certain circumstances, while others recognize the defense more widely, and apply it with less scrutiny.

SUMMARY OF REASONS FOR DENYING THE PETITION

A. *This Court Has Long Held That A Party's Laches May Bar Prospective Relief*

Contrary to Jarrow's assertion, in *Danjaq v. Sony Corp.*, 263 F.3d 942 (9th Cir. 2001), the Ninth Circuit did not depart radically from prior precedent when it concluded that laches could bar injunctive relief (Petition at p. 12). Decades before its decision in *Danjaq*, citing controlling precedent from this Court, in *Prudential Insurance Company of America v. Gibraltar Financial Corporation of California*, 694 F.2d 1150, 1152 and n.1 (9th Cir. 1982), *cert. denied*, 463 U.S. 1208, 103 S. Ct. 3538, 77 L. Ed. 2d 1389 (1983), the Ninth Circuit expressly endorsed an application of laches as a bar to injunctive relief.

In *Prudential*, citing numerous supporting cases from the Second, Third, Fourth, Seventh and Tenth Circuits, the Ninth Circuit noted that

> [t]he Supreme Court explicitly made laches available as an equitable defense barring injunctive relief in *United Drug Co. v. Rectanus Co.*, 248 U.S. 90, 102-103, 39 S. Ct. 48, 52-53, 63 L. Ed. 141 (1918); and *La Republique Francaise v. Saratoga Vichy Spring Company*, 191 U.S. 427, 436-437, 24 S. Ct. 145, 146-147, 48 L. Ed. 247 (1903).

Id. at 1152. This Court also ruled to like effect in *Hanover Star Milling Company v. D.D. Metcalf*, 240 U.S. 403, 36 S. Ct. 357, 60 L. Ed. 713 (1916) (preliminary injunction denied and plaintiff estopped from asserting trademark infringement because defendant had, in good faith, expended money and efforts to build its trade).

Accordingly, the Ninth Circuit's application of laches to bar Jarrow's claim for injunctive relief was supported by Supreme Court precedent. As is discussed below, it was also consistent with Circuit Court precedent.

B. *There Is No "Split" Among The Circuit Courts On The Availability Of Laches As A Bar To Prospective Relief*

The availability of laches as a bar to prospective relief is well accepted. *See generally*, 5 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 31.30 (4th ed. 2002) (hereinafter, "*McCarthy Trademarks*"). The list of Circuit Court decisions approving the application of a laches defense to bar prospective injunctive relief has only grown in the twenty years since the Ninth Circuit compiled its catalogue of such decisions in *Prudential*, *supra* at n.1. Since that time[1], numerous Circuits, including the Fourth and Sixth Circuits, have discussed or applied laches in the context of an application for prospective relief. *See, e.g.*, *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187, 192 (2d Cir. 1996) (dismissing on laches grounds claim for permanent injunctive relief against alleged false advertisement); *Sara Lee Corporation v. Kayser-Roth*

1. This discussion focuses only on cases decided after the Ninth Circuit's 1982 decision in *Prudential*, *supra*, because the Court in that case created a virtual digest of the rulings among the Circuits at the time. As is discussed more fully, *infra*, subsequent rulings among the Circuits have remained consistent with *Prudential*.

Corporation, 81 F.3d 455, 461 (4th Cir. 1996), *cert. denied*, 519 U.S. 976, 117 S. Ct. 412, 136 L. Ed. 2d 325 (1996) (Courts may sparingly apply estoppel by laches in trademark infringement case to deny injunction to plaintiff who unreasonably delayed seeking redress to defendant's detriment); *Skippy, Inc. v. CPC International, Inc.*, 674 F.2d 209, 212 (4th Cir. 1982), *cert. denied*, 459 U.S. 969, 103 S. Ct. 298, 74 L. Ed. 2d 280 (1982) (availability of laches as a defense to claims for injunctive relief for trademark infringement and unfair competition may be limited when defendant is guilty of bad faith infringement); *Tandy Corp. v. Malone & Hyde, Inc.*, 769 F.2d 362, 366 n.2 (6th Cir. 1985), *cert. denied*, 476 U.S. 1158, 106 S. Ct. 2277, 90 L. Ed. 2d 719 (1986) (some affirmative conduct in the nature of an estoppel, prejudice, or conduct amounting to "virtual abandonment" is necessary to deny injunctive relief in trademark infringement action); *Kellog Company v. Exxon Corporation*, 209 F.2d 562, 568 (6th Cir. 2000), *cert. denied*, 531 U.S. 944, 121 S. Ct. 340, 148 L. Ed. 2d 273 (2000) (defendant must prove elements of estoppel to defeat injunctive relief in trademark infringement action); *Chattanooga Manufacturing, Inc. v. Nike, Inc.*, 301 F.3d 789 (7th Cir. 2002) (injunctive relief denied where trademark holder's 14 year delay was unreasonable and prejudicial); *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813 (7th Cir. 1999) (claim dismissed on laches because of plaintiff's delay of over 20 years in asserting false advertising claim).

Jarrow's selective treatment of the case law (Petition at pp. 10-21) ignores the wealth of authority which shows that, rather than a "split" among the Circuits, there is virtual unanimity on the availability of laches as a bar to prospective relief. *See also* 5 *McCarthy Trademarks*, § 31.22 (4th ed. 2002).

Finally, Jarrow's argument also hinges on a fabricated public interest argument. On one level, Jarrow's claim is an attempt to enforce regulations that it has no standing to assert.

On a more important level, Jarrow's claim is premised on assumptions that are either outside the record, or are contradicted by the facts in it. Both the District Court and the Ninth Circuit considered and appropriately rejected Jarrow's public interest argument.

COUNTER-STATEMENT OF THE CASE

Jarrow filed its Complaint on August 18, 2000, and its First Amended Complaint on August 23, 2000. The First Amended Complaint asserted claims of Unfair Competition, Violation of the Lanham Act (15 U.S.C. § 1125(a)), Unfair Trade Practices under California Law (California Business & Professions Code §§ 17200, *et seq.*), and False Advertising under California law (California Business and Professions Code §§ 17500, *et seq.*) against Nutrition Now, all of which were based upon Jarrow's allegations that the label on Nutrition Now's probiotic product, "PB8," contained false and misleading statements. Jarrow sought damages and injunctive relief.

Pursuant to Supreme Court Rules 15.3, 24.2 and 24.1(g), Nutrition Now recites briefly the facts that are material to the two issues presented to this Court.[2]

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2. Jarrow's Petition cites with alarming frequency to matters outside the record in this action. The examples are too numerous to list or to correct. However, some of the more egregious examples include the following: (1) Jarrow fails to note that PB8 is a proprietary blend and, therefore, not subject to the sections of the DSHEA that Jarrow cites [Petition, p. 3, n.2]; (2) Jarrow ignores the fact that Nutrition Now's claims are made as of the date of manufacture and erroneously compares this claim with the results of Jarrow's purported tests, the invalidity of which was demonstrated in the District Court [Petition, pp. 3-6]; and (3) Jarrow claims an inability to test PB8, which, in addition to being irrelevant, is belied by Rogovin's claim that he had tested PB8 in 1993 [Petition, pp. 4-5].

A. *Nutrition Now's Probiotic Supplement, PB8*

Nutrition Now has made the same three basic claims for its PB8 product since its introduction in 1985: (1) 14 billion good bacteria at the time of manufacture; (2) 8 types of beneficial bacteria; and (3) No refrigeration needed.

The cultures from which PB8 is manufactured are tested by an independent laboratory, and the bacteria count for each lot is verified, as of the time of manufacturing. Eight different types of bacteria are used in the manufacture of the product and the product may be stored at room temperature.

B. *Consumer Satisfaction With PB8*

Nutrition Now and Jarrow are direct competitors in the natural probiotic market. Despite the highly competitive nature of the probiotic business, the market for PB8 has increased steadily due to customer satisfaction and increased distribution. Nutrition Now is one of the industry's leaders. Its growth is due to both marketing support and customer satisfaction, which was shown to the satisfaction of both the District Court and the Ninth Circuit. (Pet. Appendix A, pp. 16a-18a; Appendix C, pp. 57a-60a.) Nutrition Now is a member of the National Nutritional Foods Association ("NNFA") and the American Herbal Products Association. PB8 was named the nation's number one probiotic product by Vitamin Retailer Magazine, winning the Gold Medal "Vity" Award for Nutrition Now the last three years prior to the commencement of the action below.[3] Nutrition Now has

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3. Revealing its true motivation, Jarrow simply waited until Nutrition Now was sufficiently successful so as to warrant filing an action. As the Seventh Circuit observed in *Hot Wax, Inc. v. Turtle*

(Cont'd)

at all times complied with all applicable regulations promulgated by the Federal Food and Drug Administration concerning Probiotic products, and has never been cited for any regulatory violation concerning probiotic products.

C. *All Of Jarrow's Claims Date Back To 1993*

Nutrition Now's president, Martin Rifkin ("Rifkin"), was first confronted by Jarrow Rogovin ("Rogovin"), Jarrow's President, at a trade show in Seattle, Washington, in mid-1993. At that time, Rogovin disparaged Nutrition Now's product and business practices, and accused it of false labeling, false advertising, and fraudulent business practices — the very same claims that Jarrow asserted seven years later when it belatedly filed the underlying action.

The trade show encounter was but a precursor of Jarrow's 1993 attack on Nutrition Now's business. On September 22, 1993, Jarrow filed a letter of complaint with the NNFA, again making the same claims asserted in this case. Jarrow asserted that PB8's labeling made the following "false, unfair, misleading and illegal claims": "1) That the product contains '14 Billion Good Bacteria Per Capsule'; 2) That each capsule contains '8 Strains of Viable Bacteria'; 3) That 'No Refrigeration Needed.' " Jarrow also stated that Institut

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(Cont'd)

Wax, Inc., 191 F.3d 813, 823 (7th Cir. 1999), not only should this kind of conduct not be allowed, it underlies the purpose of the laches defense: "[I]t cannot be equitable for a well-informed merchant with knowledge of a claimed invasion of right to wait to see how successful his competitor will be and then destroy with the aid of court decree much that the competitor has striven for and accomplished." (*quoting Polariod Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 498 (2d Cir. 1961)).

Rosell, its manufacturer, had tested PB8 and that, "Institut Rosell has found virtually no live bacteria in this product." In this letter of complaint, Jarrow also complained of Nutrition Now's "protein matrix" coating[4], which it rejected as being a "fraud," "illegal," and "unfair," and the order of the organisms listed on bottles of PB8, which Jarrow attacked as "doubtful."

In a separate letter to its customers, dated September 23, 1993, Jarrow assailed PB8 as being "worthless" and "sold under false circumstances." Nutrition Now responded that Jarrow's allegations were merit less and demanded that Jarrow cease and desist its disparagement. Jarrow refused and responded on September 24 with a lengthy and vitriolic personal attack on Rifkin's character and competence, and further accused Nutrition Now of making false and unsubstantiated statements.

Rogovin continued his attack with yet another letter to Rifkin, dated September 25, 1993. In that letter, Rogovin asserted that he was pursuing a "counterassault" against PB8, and acknowledged that the time for Jarrow to file an action against Nutrition Now was running:

> I want you to be aware of the fact that my counterassault against your fraudulent marketing of PB8 is relatively kind. I could be suing you for unfair competition already. I could also have just turned Nutrition Now in to the Federal Trade Commission (FTC) for consumer fraud.

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4. Conveniently, but not coincidentally, the "protein matrix," which Jarrow had dismissed as meaningless in 1993 was not an impediment to testing PB8 until Jarrow had to try to fabricate arguments against entry of summary judgment against it in the underlying action. As noted by the District Court, the fallacy of this argument was betrayed by Rogovin himself in 1993 when he asserted that he had already had Institut Rosell test PB8 in 1993.

Acknowledging that the time-clock was ticking on his claims, Rogovin stated:

> If you knew what I knew about your product, what would you do after all this time?

and attached a further "personal note" to his letter:

> I have given you, sir, a lot of time to clean up your act. Time's up.

Although the Petition attempts to portray Rogovin as a simple businessman who lacked legal acumen, he was no stranger to litigation. On the contrary, in his 1993 letters Rogovin bragged about having sued a mutual competitor, Nature's Way, for alleged Lanham Act violations, and claimed that he protected "the entire legitimate probiotic industry." He concluded:

> Sir, you're a morsel by comparison. Don't try to bite off something you can't chew with me. There are two con jobs doing the rounds in the west coast, particularly the northwest: PB8 and Staff of Life. I intend to deliver the coup de grace to both.[5]

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5. Indeed, in an unsolicited letter to Nutrition Now's counsel, dated September 8, 2000, Rogovin detailed a history of strategic litigation against Jarrow's competitors commencing as early as 1989. In that letter, Rogovin went on to state, "The current suit, you're quite correct, may have been a situation known to us . . ." and "I would have been justified in not only suing your client for unfair competition but for libel based upon that horribly dishonest letter your client sent to its customer base dated September 30, 1993." Thus Jarrow's familiarity with the legal system and the extent of Jarrow's unreasonable delay in pursuing its claims are acknowledged expressly by its principal officer.

Despite such sabre-rattling[6], Jarrow waited seven years before he sued Nutrition Now. Similarly, Jarrow never filed any claim with the Federal Trade Commission, and, once the true facts were disclosed, Jarrow's complaint to the NNFA resulted in no action. Rather than act then on whatever legal rights it believed it had, Jarrow sat on them and attacked Nutrition Now in the court of public opinion. Pressed on this issue by both the District Court and the Ninth Circuit, Jarrow was unable to articulate any coherent or reasonable excuse for not having proceeded at that time, as he had so loudly threatened to do.

D. ***Prejudice to Nutrition Now***

Over the 15 years since PB8 was introduced in 1985, Nutrition Now expended "significant" and "enormous" resources in researching, developing, manufacturing, packaging, labeling, distributing, mass-marketing, promoting and advertising its product, while building a solid and satisfied customer base. (Pet., Appendix A, pp. 16a-17a; Appendix C, pp. 57a-58a). Nutrition Now has made heavy capital investments and invested substantial labor, which built PB8's good-will and led to national customer satisfaction. In reliance on Jarrow's acquiescence by its virtual silence between the 1993 threats and the 2000 lawsuit, in good faith Nutrition Now continued to invest in its product and developed substantial business in the probiotic field. Now, Jarrow attempts to gain through litigation the competitive advantage it failed to secure on the merits in the marketplace, which is the true proving ground for customer satisfaction and the public interest.

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6. Jarrow's "public interest" argument is also suspect because of the delay. Were the public interest truly at the bottom of this litigation, why did Jarrow not act sooner? Instead, and again putting the lie to Jarrow's opportunistic accusations, the only competent evidence in the record demonstrates consumer satisfaction with PB8.

E. *Petitioner's Erroneous "Unclean Hands" And Public Interest Arguments*

Both the District Court and the Ninth Circuit rejected Jarrow's contention that Nutrition Now had "unclean hands" in developing the market for PB8. Each court rightly found that the mere ***allegation*** that a party knew that its marketing representations were false, which is simple and easy to claim, could not defeat a valid laches defense. Otherwise, the application of laches would be effectively precluded "whenever a dispute of fact regarding the merits of a Lanham Act claim existed."(Pet., Appendix A, pp. 18a-19a; Appendix C, pp. 60a-61a). Likewise, Jarrow's irrelevant but oft-repeated and hotly disputed allegation of Nutrition Now's test result manipulation in 1993 (Pet., p. 7, n.5)[7], even assuming its truth, was rejected by the Ninth Circuit as insufficient. (Pet., Appendix C, pp. 61a-62a).

Jarrow also advanced the question of the public interest as yet another reason for the courts below to ignore its extensive delay. Both the District Court and the Ninth Circuit noted that the record established little, if any, public interest beyond Jarrow's disputed false labeling allegations. In fact, the record reflected potentially beneficial effects of and consumer satisfaction with PB8. (Pet., Appendix A, pp. 19a-20a; Appendix C., pp. 59a-60a). By contrast, there was "no evidence that N/Now's PB8 has had or is having a negative impact on the public interest[.]" (Pet., Appendix A, p. 20a). In sum, Jarrow did not present any cogent argument invoking the public interest, only its own disputed labeling allegations.

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7. Jarrow's representation of the facts concerning Alpha Omega's testing was based on Rogovin's hearsay statement, which was wholly contradicted by Rifkin before the District Court. Nutrition Now timely and properly objected, however, the claim had little impression on that Court, which found no reason to discuss it in its written opinion.

REASONS FOR DENYING THE PETITION

I. THIS COURT HAS HELD EXPLICITLY THAT LACHES MAY BAR PROSPECTIVE INJUNCTIVE RELIEF UNDER THE LANHAM ACT

This Court has repeatedly affirmed the rule that laches[8], equitable estoppel, acquiescence[9], and estoppel may bar injunctive relief where a defending party has, in good-faith, marketed and expended money and effort to build up its trade and reputation.

In *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 39 S. Ct. 48, 63, L. Ed. 141 (1918), this Court held explicitly that the laches defense is available against injunctive relief. In *Rectanus*, a senior user traded medicines under the "Rex" label, initially throughout Massachusetts; approximately six years later, the junior user began marketing similar medicines under the same label in Louisville, Kentucky. The dispute arose when the senior user expanded into the junior user's market.

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8. Three elements are needed to prove a laches defense: (1) plaintiff's knowledge of defendant's use of its mark; (2) plaintiff inexcusably delayed in taking action; and (3) defendant will be prejudiced if plaintiff were to be permitted to assert its right at this time. *Cuban Cigar Brands N.V. v. Upmann International, Inc.*, 457 F. Supp. 1090, 1096 (S.D.N.Y. 1978), *aff'd*, 607 F.2d 995 (2d Cir. 1979); *Sara Lee Corporation v. Kayser-Roth Corporation*, 81 F.3d 455, 461 (4th Cir. 1996), *cert. denied*, 519 U.S. 976, 117 S. Ct. 412, 136 L. Ed. 2d 325 (1996); *Nartron Corp. v. Stmicroelectronics, Inc.*, 305 F.3d 397 (6th Cir. 2002); *Chattanoga Manufacturing, Inc. v. Nike, Inc.*, 301 F.3d 789, 792-793 (7th Cir. 2002).

9. "Acquiescence" has been held to encompass similar factors. *Times Mirror Magazines, Inc. v. Field & Stream Licenses Company*, 294 F.3d 383, 395 (2d Cir. 2002).

Regarding the application of laches to a request for injunctive relief, this Court in *Rectanus* held that equity will bar prospective relief in cases of good-faith use of a trademark and name. *Id.* at 103. The Court reasoned that a senior user who has confined the use of the "Rex" mark to a limited territory over a long period of time risks having an innocent party apply the same mark to goods of similar character, and expend money and effort in building up a trade under it. Since Rectanus, in good faith and without prior notice, had selected the "Rex" mark and succeeded in building up a local but valuable trade under it by expending money and effort, the petitioner was estopped from setting up the mark's continued use in that territory as an infringement of the trade-mark.

Previously, in *Hanover Star Milling Company v. D. D. Metcalf*, 240 U.S. 403, 36 S. Ct. 357, 60 L. Ed. 713 (1916), this Court also concluded that plaintiff's laches and acquiescence barred injunctive relief for trademark infringement where the defendant's actions were not fraudulent, but made in good faith. *Id.* at 419. In *Hanover Star Milling*, Allen & Wheeler Company had first adopted and used the trade-mark "Tea Rose" on a type of flour that it made and sold only in that part of the United States that was North of the Ohio River. Hanover had also adopted "Tea Rose" as its mark, but in the Southeast. Due to Hanover's efforts over many years, the mark had come to mean Hanover's flour in that territory.

On the issues of laches and acquiescence in trademark infringement cases, this Court in *Hanover Star Milling* concluded that, while injunctive relief would be proper if the defendant had acted fraudulently or with knowledge of the plaintiff's rights, such relief was properly denied since Hanover had not acted fraudulently, but in good-faith. *Id.* at 419.

Even earlier, in *La Republique Francaise v. Saratoga Vichy Spring Company*, 191 U.S. 427, 437, 24 S. Ct. 145, 48 L. Ed. 247 (1903), this Court refused to enjoin the alleged infringer from using the word "Vichy" because the original user had delayed taking action for thirty years and because the labels were dissimilar. The Court reasoned that "with the yearly increasing sales and competition of the defendant company, no move was made against them for twenty-five years, and until 1898, when this bill was filed. A clearer case of laches could hardly exist." *Id.*[10]

II. THE CIRCUITS ARE NOT SPLIT — LACHES IS AVAILABLE AS A DEFENSE TO CLAIMS FOR PROSPECTIVE RELIEF UNDER THE LANHAM ACT

A. *Laches Is Universally Recognized As An Appropriate Consideration Upon An Application For Prospective Relief*

As discussed below, the Second, Third, Fourth, Sixth, Seventh, Ninth and the District of Columbia Circuits all recognize a party's laches as a defense against prospective injunctive relief under the Lanham Act.

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10. The availability of an equitable defense, including laches, to bar an injunction was also recognized in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 531, 107 S. Ct. 2971, 97 L. Ed. 2d 427 (1987), although laches was not applied on the facts of the case. In that case, the Unites States Olympic Committee ("USOC") had sued a California corporation and various individuals under the Amateur Sports Acts to restrain their use of the term "Olympics" to describe an athletic competition they sponsored. This Court held that an unauthorized user of "Olympic" words and symbols, although lacking normal statutory defenses to trademark infringement, may raise traditional equitable defense, such as laches. *Id.*

The Second Circuit has held that a defendant's good faith is a gateway key to claim the defense of laches as a bar to an injunction. In those instances, the laches defense is not only available to defeat equitable claims for an injunction in a trademark suit, but also to defeat equitable claims for an accounting. *Saratoga Vichy Spring Co., Inc. v. Lehman*, 625 F.2d 1037, 1041 (2d Cir. 1980) (federal trademark, unfair competition, false designation of origin); *Polaroid Corporation v. Polarad Electronics Corporation*, 287 F.2d 492 (2nd Cir. 1961), *cert. denied*, 368 U.S. 820, 82 S. Ct. 36,7 L. Ed. 2d 25 (1961) (plaintiff's 11-year delay, with knowledge of allegedly infringing use barred injunctive relief); *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187 (2d Cir. 1996) (claim for permanent injunctive relief against alleged false advertisement was dismissed on the grounds of laches.)

The Third and Fourth Circuits also apply laches to bar injunctive relief, but with a sense of caution. *Sobosle v. United States Steel Corp.*, 359 F.2d 7, 12 (3d Cir. 1966) (delay or laches may operate as a defense to an injunction when, in light of all the circumstances, a plaintiff has unreasonably delayed seeking relief and the opposing party has been prejudiced[11]); *Fruit Industries v. Bisceglia Bros. Corporation*,

11. While Jarrow notes that in its view there is a split in the Circuits regarding whether economic injury to a defendant caused by delay may properly constitute "prejudice" (Petition at p. 13 n.7), in fact, virtually every Circuit court has recognized economic investment/economic injury to a defendant as a proper factor to be considered in the assessment of whether laches may be asserted as a defense. The Circuits unanimously recognize that economic investment and "substantial activities" constitute prejudice in satisfaction of the third element of laches, equitable laches, or estoppel as defenses barring prospective injunctive relief. *Polaroid Corporation v. Polarad Electronics Corporation*, 287 F.2d 492, 498 (2d Cir. 1961), *cert. denied*, 368 U.S. 820, 82 S. Ct. 36,7 L. Ed. 2d 25 (1961); *Conopco, Inc. v.* (Cont'd)

101 F.2d 752 (3d Cir. 1939), *cert. denied*, 307 U.S. 646, 59 S. Ct. 1043, 83 L. Ed. 1526 (1939) (senior user's three year delays and acquiescence precluded from preventing junior user from using trademark where junior user expended money and effort in building up substantial business); *See Sara Lee*, 81 F.3d at 461 (1996) (estoppel by laches is sparingly applied in trademark infringement actions where plaintiff seeks only equitable relief). *See also* 5 *McCarthy Trademarks*, § 31.7.

Likewise, in *Skippy*, *supra*, the Fourth Circuit clarified the limitations of applying the laches defense and held that

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Campbell Soup Co., 95 F.3d 187, 192 (2d Cir. 1996); *Anheuser-Busch, Inc. v. Du Bois Brewing Co.*, 175 F.2d 370 (3d Cir. 1949), *cert. denied*, 339 U.S. 934, 70 S. Ct. 664, 94 L. Ed. 1353 (1950) (prejudice by defendant's advertising expenses and local good will); *Chapin-Sacks MFG. Co. v. Hendler Creamery Co.*, 254 F. 553, 557 (4th Cir. 1918) (expenditure with knowledge of plaintiff of large sum by deliberate infringer to develop good will in market outside plaintiffs' territory; injunction denied as to this outside territory); *Nartron Corporation*, *supra* (any prejudice is sufficient); *Chattanoga Manufacturing, Inc. v. Nike, Inc.*, 301 F.3d 789, 795 (7th Cir. 2002) (if the delay is lengthy, prejudice is more likely to have occurred, and less proof of prejudice is required); *Advanced Hydraulics, Inc. v. Otis Elevator Company*, 525 F.2d 477, 481 (7th Cir. 1975), *cert. denied*, 423 U.S. 869, 96 S. Ct. 132, 46 L. Ed. 2d 99 (1975); *Safeway Stores, Incorporated v. Safeway Quality Foods, Inc.*, 433 F.2d 99, 103 (7th Cir. 1970); *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 824 (7th Cir. 1999); *Whittaker Corp. v. Execuair Corp.*, 736 F.2d 1341, 1347 (9th Cir. 1984) (detrimental reliance found in merely continuing a business, "incurring additional potential liability" by reason of Plaintiff's delay); *N.A.A.C.P. v. N.A.A.C.P. Legal Defense & Educational Fund, Inc.*, 753 F.2d 131, 138 (D.C. Cir. 1985), *cert. denied*, 472 U.S. 1021, 105 S. Ct. 3489, 87 L. Ed. 2d 623 (1985) (injunctive relief may be appropriately barred under doctrine of laches in a trademark infringement suit when defendant invested substantial labor and capital building trademark's goodwill).

the availability of laches as a defense to claims for injunctive relief for trademark infringement and unfair competition may be limited when the defendant is guilty of bad faith infringement. *Skippy*, 674 F.2d at 212.

The Sixth Circuit's application of laches in trademark infringement cases is well recognized and in some cases depends upon the facts and circumstances of each case. Estoppel (delay, coupled with prejudice) forecloses a plaintiff from obtaining injunctive relief in a trademark infringement action. *TWM Manufacturing Co., Inc. v. Dura Corp.*, 592 F.2d 346, 349-50 (6th Cir. 1979), *cert. denied*, 479 U.S. 852, 107 S. Ct. 183, 93 L. Ed. 2d 117 (1986) (delay of six years and two months); *Tandy Corp.*, 769 F.2d at 366 n.2 (to deny injunctive relief in a trademark infringement action, some affirmative conduct in the nature of an estoppel or conduct amounting to "virtual abandonment" is necessary); *Kellog Company v. Exxon Corporation*, 209 F.3d 562, 568 (6th Cir. 2000), *cert. denied*, 531 U.S. 944, 121 S. Ct. 340, 148 L. Ed. 2d 273 (2000) (defendant must prove elements of estoppel to defeat a suit for injunctive relief). Indeed, in the recent case of *Nartron Corporation, supra*, the court held that a trademark holder was not entitled to prospective relief 11 years after it had knowledge of the alleged infringing activity. (305 F.3d 397, October 1, 2002).

There is no dispute as to the consensus within the Second, Seventh and Ninth Circuits[12]. Jarrow itself submits that the latter

12. Likewise, as noted by the Court below, under California law, laches may properly be applied to defeat an application for prospective relief. *See* Pet., Appendix C, pp. 62a-63a; *Finnie v. Town of Tiburon,* 199 Cal. App. 3d 1, 244 Cal. Rptr. 581, 588 (1988), and cases therein cited. *See also Newman v. Checkrite California, Inc.*, 912 F. Supp. 1354, 1376 (E.D. CA. 1995) (equitable defenses are ordinarily appropriately raised against claims under California Business and Professions Code).

Circuits permit a laches defense to claims for prospective relief in trademark cases. *See Chattanoga Manufacturing, Inc. v. Nike, Inc.*, 301 F.3d 789 (7th Cir. 2002) (judgment for defendant in trademark infringement action for damages and injunctive relief where plaintiff's laches was unreasonable and prejudicial since competitor spent millions of dollars annually promoting its products); *Seven-Up Company v. O-So-Grape Co.*, 283 F.2d 103 (7th Cir. 1960), *cert. denied*, 365 U.S. 869, 81 S. Ct. 903, 5 L. Ed. 2d 859 (1961) (plaintiff's laches barred injunctive relief to restrain Defendant from using trademark); *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813 (7th Cir. 1999) (twenty-year delay constitutes laches which barred plaintiff's false advertising claim); *James Burrough Ltd. v. Sign of Beefeater, Inc.*, 572 F.2d 574, 578-79 (7th Cir. 1978) (affirmative conduct in the nature of estoppel is needed to deny injunctive relief in trademark litigation); *Continental Coatings Corporation v. Metco, Inc.*, 464 F.2d 1375, 1378 (7th Cir. 1972) (plaintiff not entitled to equitable relief for damages for future infringement where delay was unreasonable and unexcused); *Danjaq v. Sony Corp.*, 263 F.3d 942 (9th Cir. 2001) (laches barred prospective injunctive relief as well as retrospective relief in a counterclaim for copyright infringement); *Whitman v. Walt Disney Prod's Inc.*, 263 F.2d 229 (9th Cir. 1958) (laches barred action where passage of time lulled defendant into a false sense of security, and defendant acted in reliance); *E-Systems, Inc. v. Monitek, Inc.*, 720 F.2d 604, 607 (9th Cir. 1983) (for laches to constitute a defense where injunctive relief is sought, passage of time must be accompanied by circumstances which estop plaintiff from obtaining injunctive relief; laches barred injunctive relief).

The cases cited by Jarrow do not support its argument that a "split" exists in the Circuits. Jarrow cites to one case from the Third Circuit in support of its position: *University of Pittsburgh v. Champion Products Inc.*, 686 F.2d 1040 (3d Cir. 1982), *cert. denied*, 459 U.S. 1087, 103 S. Ct. 571,

74 L. Ed. 2d 933 (1982)[13] However, this case is consistent with and reinforces Nutrition Now's arguments: actual laches works as an equitable estoppel barring ***all*** relief and requires a showing of both delay ***and*** prejudice. *Id.* at 1044. Accordingly, the reason why the *Pittsburgh* Court concluded that the university's delay did not bar its right to injunctive relief was that the manufacturer had ***not been prejudiced*** by it. The Court required a showing of delay, coupled with prejudice, and rejected only Champion's contention that delay alone bars prospective relief. *Id.* at 1946. The Court did not reject the concept of economic prejudice as an element of a laches defense. Rather, the Court found that Champion had not demonstrated any such prejudice. In sum, Champion had not satisfied the third element of laches: prejudice.

Jarrow relies upon *Lyons Partnership, L.P. v. Morris Costumes, Incorporated*, 243 F.3d 789 (4th Cir. 2001) for the proposition that, in the Fourth Circuit, "laches does not bar claims for prospective relief under the Lanham Act at all." (Pet. p. 18). Jarrow overstates the holding in *Lyons* and other Fourth Circuit authority is in accord with the general rule. As the Fourth Circuit noted in *Sara Lee Corp.*, *supra*, estoppel by laches may bar relief where the plaintiff has unreasonably delayed seeking redress, despite its knowledge of the defendant's infringing conduct, and the defendant has been prejudiced as a result. The laches defense is limited, however, in situations, unlike the one at bar, where there is no prejudice to the defendant, or demonstrable confusion or other public interest evidenced. *Danjaq*, 263 F.3d at 960. (*See* Pet., Appendix C, p. 58a.) *Lyons* involved a dispute between the creator's of Barney, a purple dinosaur character, and costumers who were creating and renting confusingly similar costumes. There was no evidence of any

13. Jarrow erroneously cites to this case as 686 F.3d 1040 (3d Cir. 1982).

prejudice to defendants as a result of plaintiff's delay in asserting its rights. On the contrary, the costumers had merely added the infringing costumes as one more of the many that they offered to the public. Both *Danjaq* and the Ninth Circuit in the case below noted this distinction. By contrast, the uncontradicted evidence in the case below was that Nutrition Now had invested heavily in developing PB8, to its prejudice, in reliance on Jarrow's acquiescence. Further, the Court in *Lyons* was protecting both the owner's property rights and the public's demonstrated interest in not being confused. Jarrow, by contrast, has no property interest to protect, and, as held by each Court having reviewed the facts of this case, there is no public interest involved. As noted above, the only evidence in the record is of consumer satisfaction with PB8.

Jarrow's reliance on *Kellogg Company v. Exxon Corporation*, 209 F.3d 562 (6th Cir. 2000), *cert. denied*, 531 U.S. 944, 121 S. Ct. 340, 148 L. Ed. 2d 273 (2000) is also misplaced. In that case, the Court did not reject laches as a defense to injunctive relief. Rather, it held that mere delay was insufficient. The court ruled that to "defeat a suit for injunctive relief, a defendant must also prove elements of estoppel which requires more than a showing of mere silence on the part of the plaintiff." *Id.* at 574. Defendant is also required to show that it was misled by plaintiff through actual misrepresentations, affirmative acts of misconduct, intentional misleading silence or conduct amounting to virtual abandonment of the trademark. *Id.* The Court did not find an estoppel since the record reflected a genuine factual issue of whether plaintiff was put on notice regarding defendant's use of the trademark at issue. In fact, when Plaintiff requested examples of defendant's then-current use of the trademark, defendant failed to include examples of the trademark's use in connection with the sale of food items, which led plaintiff to believe that defendant's use was limited

to the promotion of petroleum products. *Id.* Thus, defendant failed to establish the first element of laches: plaintiff's knowledge of defendants' infringement.

B. *Permutations In Terminology Between The Circuits Do Not Undermine The Consensus That Laches May, In Appropriate Circumstances, Bar Prospective Injunctive Relief*

What Petitioner calls a "split" of authority is nothing more than the use of variant terminology by the Courts to describe the same principles that they apply universally: the lapse of time, coupled with prejudice to defendant or other affirmative conduct on plaintiff's part such as estoppel or acquiescence, bars prospective injunctive relief in a trademark infringement action. As J. Thomas McCarthy eloquently stated:

> [a] good deal of confusion in the case opinions is created by differing meanings attached to the word "laches." Some courts use the word to refer only to plaintiff's unreasonable delay in filing suit. Other courts use the word to refer to the conclusion that plaintiff is estopped by its delay coupled with resulting prejudice to defendant . . . most patent infringement cases appear to define "laches" as that delay with resulting prejudice which bars remedies for past infringement, while "estoppel" is that degree of delay and prejudicial reliance on the patentee's inaction which will bar prospective relief as well. The semantic picture is further clouded by confusing use in the trademark cases of the term 'acquiescence.'

5 *McCarthy Trademarks*, § 31.2 (4th ed. 2002).

Professor McCarthy went on to state:

> The inter-relationship between delay, prejudice and estoppel was explained by one court in these terms: In order to find that a claimant's . . . interminable inactivity or negligence has swollen to the level of disabling laches or estoppel, his delay must be an inexcusable one that has consequently prejudiced an innocent user . . . By the mechanics of this precept, equity comes to the aid of an innocent user and grants him refuge from a claimant who has calmly folded his hands and remained silent while the innocent user has exploited and strengthened his mark. . . One who is estopped may be merely the hapless victim of his own lethargy. Estoppel, then is synonymous with apparent or implied acquiescence. *Id.*

Of course there will be variations in the application of the laches doctrine based on factual permutations. This is logical since all Circuits agree that the application of laches is left to the sound discretion of the district court—to be reviewed only for clear error of law or abuse of discretion[14].

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14. **First Circuit**: *Ansin v. River Oaks Furniture, Inc.*, 105 F.3d 745 (1st Cir. 1997), *cert. denied*, 522 U.S. 818, 118 S. Ct. 70, 139 L. Ed. 2d 31 (1969) (laches ruling reviewed under abuse of discretion standard). **Second Circuit**: *Eppendorf Netheler Hinz GMBH v. National Scientific Supply Co.*, 14 Fed. Appx. 102 (2d Cir. 2001) (same). **Third Circuit**: *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124 (3d Cir. 2000) (same). **Fourth Circuit**: *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990), *cert. denied* 501 U.S. 1260, 111 S. Ct. 2916, 115 L. Ed. 2d 1079 (1991) (same). **Fifth Circuit**: *Kennedy v. Electricians Pension Plan, IBEW No. 995*, 954 F.2d 1116 (5th Cir. 1992) (same). **Sixth Circuit**: *City of Wyandotte v. Consolidated Rail Corp.*, 262 F.3d 581 (6th Cir. 2001) (same). **Seventh Circuit**: *Hot Wax v. Turtle Wax*, 191 F.3d 813 (7th Cir. 1999) (Cont'd)

These linguistic variations were discussed by the District Court in *Alfred Dunhill of London, Inc. v. Kasser Distillers Products Corp.* 350 F. Supp. 1341 (E.D. Pa. 1972), *aff'd mem.*, 480 F.2d 917 (3d Cir. 1973), where the Court stated:

> The varying visage of the term "laches," i.e., "laches in the sense of mere delay," "laches without more," "laches by estoppel," has only muddled the concept as it is used in trademark law, for restricting the definition of laches only in terms of delay does not comport with the classic definition. *Id.* at 1364-1365.

The *Dunhill* Court concluded that while mere delay may not bar relief, laches does. *Id.* at 1365. Further, the Court determined that laches and equitable estoppel are similar, so it discussed them together, recognizing that "the defendant's intent is an equitable consideration under either." *Id.* The Court also noted that principles of laches by estoppel or equitable estoppel will bar all relief. To invoke equitable estoppel, plaintiff must be charged with inexcusable delay which prejudiced the innocent defendant. *Id.* at 1364.

(Cont'd)

(same). **Eighth Circuit**: *Foy v. Klapmeier*, 992 F.2d 774 (8th Cir. 1993) (court's ruling on equitable matters reviewed under abuse of discretion standard). **Ninth Circuit**: *Danjaq v. Sony Corp.*, 263 F.3d 942 (9th Cir. 2001) (laches ruling reviewed under abuse of discretion or clearly erroneous standard). **Tenth Circuit**: *Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 510 U.S. 1004, 114 S. Ct. 580, 126 L. Ed. 2d 478 (1993) (court's ruling on equitable matters reviewed under abuse of discretion standard). **Eleventh Circuit**: *Godfrey v. BellSouth Telecommunications, Inc.*, 89 F.3d 755 (11th Cir. 1996). **Federal Circuit**: *Wanlass v. Fedders Corp.*, 145 F.3d 1461 (Fed. Cir. 1998) (laches ruling reviewed under abuse of discretion standard).

The concept of evaluating the essence of the defense, regardless of the variant nomenclature involved, was endorsed by the Third Circuit in *Anheuser-Busch, Inc. v. Du Bois Brewing Co.*, 175 F.2d 370 (3d Cir. 1949), *cert. denied*, 339 U.S. 934, 70 S. Ct. 664, 94 L. Ed. 1353 (1950), a case relied on by the Third Circuit in *University of Pittsburgh v. Champion Products, Inc.*, *supra*. In that case, the Court held that after 31 years of delay, the plaintiff was guilty of "inexcusable laches" and was "grossly remiss." *Id.* at 374. The Court found that the long delay prior to the filing of the complaint for injunctive relief amounted to at least an acquiescence, if not an abandonment of the exclusive right in use of the trademark. Accordingly, the Court ruled that plaintiff was estopped from asserting its claim.

III. THE PUBLIC INTEREST IS ADEQUATELY PROTECTED

In the absence of a threat to the public health, as here[15], the public interest in false advertising cases is the same as it is in trademark infringement cases. Accordingly, there is "no distinction between trademark cases and misleading advertisement cases for the purpose of laches. In both contexts, laches may properly be applied so long as its application is equitable in light of the public's interest in being free from confusion and deception." 5 *McCarthy Trademarks*, § 31.1 (4th ed. 2002) *citing Conopco, Inc. v. Campbell Soup Company*, 95 F.3d 187, 193 (2d Cir. 1996) (estoppel by laches found and § 43(a) false advertising charge dismissed), and *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813 (7th Cir. 1999) (twenty-year delay constituted laches which barred plaintiff's false advertising claim).

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15. As noted by both the District Court and the Ninth Circuit, the record is devoid of any evidence of a threat to the public health. On the contrary, the only evidence presented establishes both a benefit to the public health and consumer satisfaction with the PB8 product. (Pet., Appendix A, pp. 19a-19b; Appendix C, p. 60a).

Case law developed in the context of trademark infringement is applicable to the analysis required in this case. Indeed, contrary to Jarrow's assertion (Pet. at p. 22), trademark infringement cases arguably present a more compelling case for prospective relief than do false advertising cases. Typically, in trademark infringement cases, the plaintiff is seeking prospective protection for its valuable property interests. By contrast, false advertising claims involve, at best, economic claims by a party whose interests are market competitive. Such interests present a less forceful case for equitable intervention by way of injunctive relief, particularly preliminary injunctive relief, where the facts are disputed, there is no bad faith, and where the only evidence presented shows public satisfaction with the product that is being attacked by the competitor.

Although the public's interest in being free from confusion with respect to products in the marketplace is important, that interest alone cannot stand as a bar to the application of laches in cases involving Lanham Act claims. *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 826 (7th Cir. 1999). Jarrow's argument disregards completely the fact that, as in *Hot Wax, supra*, Nutrition Now has offered ample evidence of consumer satisfaction with PB8 both by testimonials and market approval. Moreover, Nutrition Now has never been cited for any regulatory violation concerning PB8. This evidence trumps Jarrow's speculative argument regarding harm to the public interest, which is founded solely upon Jarrow's extrapolation of its labeling dispute. Both the District Court and the Ninth Circuit considered and properly rejected Jarrow's claim on this point.

The District Court and the Ninth Circuit expressly weighed the public interests involved and found that, on the facts presented, the only evidence in the record showed a benefit to the public interest, rather than a detriment. (Pet., Appendix A, pp. 19a-20a; Appendix C, p.60a). This, coupled with the prejudice to Nutrition Now caused by Jarrow's extraordinary and unjustified delay, not only in filing suit but also in failing to involve the regulatory agencies actually given the charge of protecting the public interest, renders the decisions of the Courts below correct on these facts.

Jarrow has no evidence in support of its public interest argument. In fact, Jarrow's position "compares apples with oranges." As is noted clearly on Nutrition Now's label, all bacterial counts are made as of the time of manufacturing; however, all of Jarrow's "tests" occurred later and under dubious conditions. Ironically, Jarrow itself markets a competitive product for which it makes similar claims. At best, there are disputed claims regarding the status of certain ingredients. Considering there has been no showing that PB8's labeling is having a negative impact on the public interest, and in the face of satisfaction with the product, Jarrow's self-serving consumer public interest argument should not stand in the way of the application of the doctrine of laches. In short, Jarrow's public interest argument is competitive warfare in disguise.

Importantly, the Food and Drug Administration ("FDA") and the Federal Trade Commission ("FTC") have the authority to and do supervise and regulate the field, using, among other tools, the Dietary Supplement Health and Education Act of 1994 ("DSHEA") together with federal and state unfair business practice and false advertising laws.

21 C.F.R. §§ 101.13, 101.14 and 101.36 (2001). Those agencies have "jurisdiction" to take action against nutritional supplement companies. If Jarrow truly believed that PB8 presented a threat to the public interest, it would have sought to involve those agencies. Inexplicably, however, in the face of such an allegedly dire threat to the public, Jarrow never tried to involve either agency. The reason for Jarrow's reticence is that Jarrow was likely more interested in the potential for obtaining monetary relief, so it proceeded only by the instant lawsuit.

Regardless of Jarrow's motivation, it lacks standing to pursue claims under DSHEA and cannot bootstrap Lanham Act claims into an enforcement action. Individuals cannot use the Lanham Act's provisions against false, deceptive and misleading advertising to enforce FDA regulations. *Mylan Laboratories, Inc. v. Matkari*, 7 F.3d 1130, 1139 (4th Cir. 1993). Ingenious pleading to escape the principle that FDCA does not create a private right of action by making it appear that another law "not truly appropriate is applicable" is contrary to the established case law. *See Eli Lilly & Co. v. Roussel-Uclaf Holdings Corp.*, 23 F. Supp. 2d 460 (D.N.J. 1998) ("every federal court that has addressed the issue has held that the FDCA does not create a private right of action to enforce or restrain violations of its provisions and accompanying regulations"); and *Dial A Car, Inc. v. Transportation, Inc.*, 82 F.3d 484, 490 (D.C. Cir. 1996) (rejecting the "back door method" of enforcing administrative agency rules through the use of the Lanham Act).

The economic nature of Jarrow's claims render its plea for prospective injunctive relief suspect on at least two fundamental grounds. First, Jarrow's argument that it is truly seeking to protect the public interest, as its claims are presented

before this Court, is belied by its extensive delay in asserting those claims, despite particularized threats of action to be taken both via litigation and by complaint before regulatory agencies (*i.e.*, the Federal Trade Commission and/or The Food and Drug Administration). In short, Jarrow's actions speak louder than its words. Second, if Jarrow's delay in asserting its claims was prompted by the fact that only by the year 2000, after Nutrition Now had, via its marketing expenditures, established a strong position in the market, did Jarrow believe it worthwhile to pursue its alleged claims, it has thus shown its true colors. Jarrow either lay in wait until the prospect of economic damages was sufficiently lucrative to justify the litigation effort, or until the market impact upon its business was noticeable. Either way, Jarrow's equitable position must be balanced against the prejudice to Nutrition Now, both in the form of evidentiary prejudice and in the form of economic prejudice incurred by Nutrition Now in reliance on the hollowness of Jarrow's threat of suit.[16]

On balance, as found by both the District Court and the Ninth Circuit, Nutrition Now's prejudice was substantial and far outweighed any equitable claim presented by Jarrow. On the facts presented, that determination should not be disturbed by this Court.

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16. *See* n.10, *supra*.

CONCLUSION

For the foregoing reasons, Nutrition Now respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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